

Protest of)	
)	Date: September 26, 1988
Plaza Printing)	
)	
Purchase Order No. 120440-88-P-0671)	P.S. Protest No. 88-39

DECISION

Plaza Printing protests the award to Graphics & Associates of Purchase Order No. 120440-88-P-0671 for a one-year term agreement to print a monthly employee newsletter. The protester contends that it was not given an opportunity to submit a quote for the one-year term agreement and that the contracting officer acted improperly in awarding the term agreement.

The Support Services Office of the Atlanta Division sought to award a one-year term agreement for the production of the employee newsletter, "The Atlanta Postmark." In an effort to select a contractor for such effort, it awarded printing contracts for separate issues to each of three vendors. The vendors were advised before printing that quality would be a major factor in determining which company would ultimately be awarded the term printing agreement. Plaza Printing was awarded a contract for the January 1988 issue. The Atlanta Division, however, did not consider it appropriate to judge Plaza Printing's quality by the January 1988 issue because of misunderstandings concerning the job. Plaza Printing was therefore awarded a second contract to produce the April 1988 issue.

After the one-month trial issues were completed, the Division determined that the price differential among the trial issues was insignificant, based on the prices received for the four trial issues.^{1/} The Marketing and Communications Department determined that Graphics & Associates had the highest quality trial issue. Based on this determination,

^{1/}The prices for the trial issues were as follows: \$4,100 for 13,000 copies by Plaza Printing; \$4,194 for 14,000 copies by Graphics & Associates; \$3,923.20 for 13,000 copies by Genographics, Inc; and \$5,000 for 16,000 copies by Plaza Printing.

on May 16, 1988, the contracting officer awarded the one-year term agreement to Graphics & Associates for an estimated cost of \$50,000.

Plaza Printing protested the issuance of the purchase order by letter of June 20, 1988 to the contracting officer, stating the following as its grounds for protest:

1. No formal bid [sic] package received.
2. No verbal or written pricing request for a twelve month contract.
3. Verbal statement of "If there were a contract the contract would be based on a month to month performance only."
4. Changing of specification after job was received by bidder.
5. No notification to unsuccessful bidder in a timely manner.
6. Not making bidder aware of protest against contracting procedures and awards policy, after bidder clearly asked if there were any administrative process procedures that could be heard or reviewed for argument.
7. There was no Equal Opportunity afforded to bidder because of his race.

Pursuant to Postal Contracting Manual (PCM) '2.407.8(e), the contracting officer referred the matter to this office for resolution. In his report to this office, the contracting officer set forth his response to each of the seven grounds for protest.

Prior to considering the merits of the protest, we must decide whether it was timely submitted. PCM '2-407.8(d)(3) provides that "no protest will be considered if received more than 15 working days after award of the contract in question." The contracting officer contends that the protest is untimely, because the term agreement was awarded on May 16 and the protest was not received until June 20. We find the protest timely, however, because May 16 is not the date of contract award. As we stated in Neese Floor Covering, Inc., P.S. Mistake Claim No. 74-3, November 5, 1974, a purchase order is not an acceptance of an offer to make a contract; it is an offer to buy the quoter's goods or services upon specified terms and conditions. A contract does not come into being until the offeree actually and substantially performs the specified work. Id. According to the Atlanta Division, Graphics and Associates was given the copy for the June issue on June 7, but could not start work on the issue until June 10. Since the protest was submitted less than 15 working days from either of these days, and less than 10 working days from the date after the information on which it is based became

known,^{1/} the protest is timely.

We discuss the grounds of protest in the order presented by the protester. Plaza Printers contends that it failed to receive a solicitation package. As part of the process of selecting a printer for the contemplated one-year term agreement, the Atlanta Division issued a series of purchase orders for trial issues to a variety of printers. The printers receiving these purchase orders were aware that they were the initial step in the selection of a printer for the one-year term agreement. Plaza Printing and other printers were thus solicited to compete for the one-year term agreement. The requirements for the trial issue purchase orders were the same as those for the one-year term agreement. Plaza Printing was aware that the one-year term agreement would be awarded based on price and the quality of its performance under the trial issue contract. While a solicitation package was not issued for the one-year term agreement, written purchase orders were issued for the trial issues and newsletter specifications were provided. The Postal Contracting Manual does not require that a formal solicitation package be used when a request for quotations is made. See PCM 6-106.2(a).

Plaza Printing contends that the contracting officer should have sought a quote from it for the one-year contract instead of determining that the price differential was insignificant based on the prices of the trial issues. We agree with Plaza Printing that its price for the trial issue was not necessarily indicative of the price it would have submitted for a one-year term agreement. As it turns out, however, the prices for both Graphics & Associates' and Plaza Printing's one-month trial issues do not vary significantly from the monthly prices they offered, or would have offered, for the one-year term agreement. Graphics & Associates' trial issue price was \$4,194 for 13,000 copies; the estimated one-year term agreement price of \$50,000 for 14,000 copies works out to \$4,167 per month. Plaza Printing's trial issue prices were \$4,100 for 13,000 copies and \$5,000 for 16,000 copies; it asserts that its one-year term agreement price for 14,000 copies would have been \$47,000,^{1/} or \$3,917 per issue.

^{2/}There are conflicting allegations concerning the date when Plaza Printing was informed of the award. Plaza Printing contends it was not made aware until June 13; the contracting officer states that he orally informed Plaza Printing "of the decision to award to Graphics & Associates" on May 16. As the record before us contains no written notice to Plaza Printing of the award to Graphics & Associates, we lack objective evidence as to when the information on which the protest is based became available to the protester. Since a protester is not required to demonstrate by "concrete evidence" that a protest is timely, we will consider the 10 day rule to have been met. Lott's, P.S. Protest No. 80-8, March 10, 1980.

^{3/}A protester's assertion in the course of a bid protest, after other prices have been exposed, of what its previous undisclosed price would have been must be viewed with some skepticism. Here we note that when asked by this office what its one-year price would have been Plaza Printing originally stated that it would have been \$4,890 per issue, making a total of \$58,680 for the one-year term agreement. When advised that \$58,680 was greater than the estimated price of Graphics & Associates' one-year term agreement, Plaza Printing first expressed disbelief at Graphics and Associates' price and then sought to disassociate itself from the \$4,890 figure. Plaza Printing later stated that its price for the one-year term agreement based on the specifications would have been \$47,000.

The contracting officer's conclusion that prices for the one-year term agreement would not significantly differ was therefore accurate. Plaza Printing was thus not prejudiced by the contracting officer's failure to solicit a one-year price.

The next ground for protest is the contracting officer's statement to Plaza Printing that the one-year term agreement would be based on month to month performance only. We see no ground for protest in this statement. The one-year term agreement does not guarantee that the Postal Service will order monthly issues. It states, in pertinent part:

The term printing agreement is not a guarantee that any specific number of monthly issues will be printed. The Postal Service is therefore obligated only to the extent that printing is ordered.

The contracting officer's statement to Plaza Printing was thus a correct statement.

Plaza Printing contends that the specifications for the one-year term agreement are different from those employed for the trial issues. According to the contracting officer, the same one-page specifications that applied to the one-year term agreement applied to the trial issues. The Communications Department of the Atlanta Division informs this office that it provided Plaza Printing with the newsletter specifications for the trial issues. Nothing in the record indicates that the newsletter specifications attached to the one-year term agreement differ from the specifications Plaza Printing was given for the trial issues.

Plaza Printing next contends that it was not timely informed that it was an unsuccessful offeror and was not advised of the Postal Service's bid protest procedures after it asked the contracting officer if there were any administrative procedures where its arguments could be heard. The contracting officer states that Plaza Printing was orally notified of the decision on the day of award. As to administrative procedures, the contracting officer states that Plaza Printing asked only whether there was a procedure for persuading the contracting officer to delay award. The contracting officer also states that Plaza Printing knew about protest procedures because, prior to award, it threatened to protest the procurement if it were not given the award. Since the protest is timely submitted, Plaza Printing was not prejudiced by any failure of the contracting officer to provide information concerning award of the one-year term agreement and our bid protest procedures. See Automation Industrial Control, Inc., P.S. Protest No. 88-06, August 16, 1988. Thus, any such failures afford the protester no grounds for relief.^{4/} Id.

Plaza Printing asserts that it was not afforded equal opportunity for award because of

^{4/} We also note that our bid protest procedures, which are contained in the Postal Contracting Manual, have the force and effect of law, and bidders are held to have constructive notice of them. Dawson Construction and Electric, P.S. Protest No. 87-28, June 5, 1987.

the race of its authorized agent. The contracting officer assumed that Plaza Printing was a minority business because the authorized agent it was dealing with was black. However, Plaza Printing states that it is not a minority-owned business. There is no evidence that the contracting officer's assumption that Plaza Printing was a minority business in any way harmed its opportunity for award. The contracting officer states that it gave Plaza Printing the opportunity to produce a second trial issue to encourage the participation of what he believed was a minority-owned business in the procurement process and to ensure that the firm was fairly evaluated. We find no evidence of discrimination against Plaza Printing because of the race of its agent.

Plaza Printing also contests the reasons given by the contracting officer for the finding that the quality of its trial issue was unacceptable. Based on the recommendation of the Marketing and Communications Department, the contracting officer awarded the one-year term agreement to Graphics & Associates because of several quality deficiencies in Plaza Printing's trial issue. The quality deficiencies were several instances of broken copy, misalignment of columns and copy on the page, and excessive bleed through of copy from the reverse side of the page. Plaza Printing contends that the broken copy was caused by the use of the Postal Service's laser printer for the typeset copy, that the misalignment was caused by the Postal Service, and that bleed through is strictly a function of the gauge of paper which it was told to use.

At the outset we note that this office cannot substitute its judgment for that of the technical evaluators or disturb their evaluation unless it is shown to be arbitrary, clearly unreasonable, or in violation of procurement regulations. See Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986; H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984. With that standard in mind, we have examined the April issue and the paste-up boards which were prepared by Plaza Printing. There are three instances of broken copy. In one instance on page 3, examination of the paste-up board reveals a small sliver of waxy paper which covers up part of the copy. The gaps in the printed issue correlate exactly with the areas obscured by the waxy sliver of paper; the typesetting itself is not broken. In another instance on page 6, the Postal Service supplied typesetting contained on the paste-up board shows no gaps in letters, but the printed issue does show gaps. The broken copy on these pages is thus not attributable to the Postal Service's laser printer. On page 11, the broken copy that appears in an advertisement also appears on the typeset material contained on the paste-up boards. Since the Postal Service provided this typeset material, that broken copy is not the fault of Plaza Printing. As to alignment and printing, the paste-up boards show the same misalignment and printing too close to the margin which are apparent from inspection of pages 1, 4, 5, and 15 of the printed issue. Since Plaza Printing was responsible for laying out the typeset copy on the paste-up boards, these alignment and centering problems are attributable to it. As to bleed through, the printed copy sent to us did not show any greater bleed through than the trial issue printed by the awardee. The Atlanta Division, however, states that it

threw away a large number of copies which contained excessive bleed through.

Except for one instance of broken copy, we find that the quality issues raised by the Atlanta Division exist and are not attributable to Postal Service causes. The technical evaluators therefore properly could consider these concerns in evaluating the quality of Plaza Printing's trial issue. We cannot conclude that the technical evaluators acted arbitrarily, clearly unreasonably, or contrary to applicable regulations in assessing the quality of Plaza Printing's trial issue. We therefore cannot say that the contracting officer improperly awarded the one-year term agreement to Graphics & Associates based on the quality of the trial issues.

Plaza Printing contends that the Atlanta Division signed off on the paste-up boards, and that any quality deficiencies on the boards were thus waived by the Postal Service. According to the Marketing and Communications Department, it reviewed photocopies of the paste-up boards. The purpose of such review was to permit the Postal Service to make corrections prior to the press run. Such review did not absolve Plaza Printing from the quality deficiencies which appeared on the printed issues. See Montgomery Ross Fisher, Inc., GSBCA No. 2849, 70-1 BCA & 8127.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 2/25/93]